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ABSTRACT

The United States Supreme Court's ruling in the "Houchins v KQED" case exemplifies the confusion of that court concerning any consistent view of the First Amendment of the United States Constitution, especially in terms of newsgathering and prior restraint. In this case, the Court reversed a lower court's decision that had held invalid a California sheriff's denial of media access to a prison. The Court's opinion, written by Chief Justice Warren Burger, was rooted in earlier decisions in which the Court had held that newspeople had no greater right of access to information than did the general public. This ruling is at odds with the traditional meaning and historical purpose of the First Amendment in terms of the role of the free press in a self-governing population. The public's right to know, recently upheld by the Court in several cases, was virtually ignored in the "Houchins v KQED" ruling. In actuality, the ruling was a 3-1-3 decision since Chief Justice Burger, joined by Justices Byron White and William Rehnquist, delivered the opinion; Justice John Paul Stevens, joined by Justices William Brennan and Byron Powell, wrote the dissent; and Justice Potter Stewart concurred in judgment but not in the rationale for reaching it. Such a ruling provides ground for supporting almost any interpretation of the First Amendment, symbolizing in so doing the confusion of the Court regarding this amendment. (Author/FL)

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KQED: A CASE STUDY IN CONFUSION

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KQED: A CASE STUDY IN CONFUSION

> "A popular Government, without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives."[1]

The terms of the First Amendment, absolute though they are, have become cloaked in ambiguity through interpretation and application. Neither the Supreme Court, nor any other court, regularly reevaluates the meaning of the various articles and amendments to the Constitution. Interpretation thus relies on the issues of the case; interpretation becomes a function of the case at hand. And evaluation, when it occurs, takes on the coloration of the specific situation that created the case and its resultant appeal. At times this approach is particularly limiting and may, as in Houchins v. KQED,[2] be dangerously limiting to the overall interpretation of the section or amendment in question.

That potential for constriction or delimiting is quite clear in Houchins. The ruling of the U.S. Supreme Court that upheld Sheriff Houchins' right to deny the media access to the Santa Rita prison in Alameda County, California, is inconsistent with the traditional meaning and the historical purpose of the First Amendment. The effect of the ruling in this case is also inconsistent with court cases dealing with prior restraint. In addition, arguments used to support the Court's ruling are inconsistent with arguments basic to other media-related cases that were heard by the Court prior to and after Houchins.

Houchins is in essence a news gathering case in which the Supreme Court concluded:

> Neither the First Amendment nor Fourteenth Amendment mandates a right of access to governemnt information or sources of information within the government's control...until the political branches decree otherwise, as they are free to do, the media has no right special of access to the Alameda County Jail different from or greater than that accorded the public generally.[3]

In this case, Petitioner Houchins, sheriff of Alameda County in California, has legal control over the county jail at Santa Riga. KQED operates both television

and radio stations in the San Francisco Bay area, including stations which had previously reported prison news. In March 1975, KQED reported an inmate's suicide in the Little Greystone portion of the Santa Rita facility. The broadcasting company asked the sheriff's permission to inspect and photograph the Little Greystone area. The sheriff refused permission. After the refusal, KQED and the Alameda and Oakland branches of the NAACP filed suit against the sheriff, claiming their First Amendment rights had been violated by his refusal of media access thus "failing to provide any effective means by which the public could be informed of conditions prevailing in the Greystone facility or learn of the prisoners' grievances"[4]

The U.S. District Court preliminarily enjoined the sheriff from denying KQED news persons and other bona fide news persons access at "reasonable times." U.S. Court of Appeals, Ninth Circuit, supported this action: "Clearly, the First Amendment grants the news media a constitutionally protected right to gather news...This right is indispensable in preserving the news media as a major source of information for the public, particularly when the information sought concern governmental institutions, including prisons."[5]

The Appellate Court justified the existence of the injunction, although admittedly this action ran counter to the position seemingly taken by the U.S. Supreme Court in Pell.[6] The sheriff's position, based on Pell was simply that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public."[7]

The Ninth Circuit however, interpreted Pell such that:

> "the news media's constitutional right of access to prisons or their inmates is co-extensive with the public's right. Implicit in the trial court's memorandum granting the preliminary injunctions is the finding that the First Amendment rights of both the public and the news media were infringed by the appellant's restrictive policy...the trial court applied the proper test to determine whether these rights were infringed:

a grovenmental restriction of First Amendment rights can be upheld only if the restriction furthers an important or substantial governmental interest unrelated to suppressing speech and the restriction is the least drastic means of furthering that governmental interest."[8]

The preliminary injunction had, according to the Circuit Court, satisfied the government's interest in jail security and inmate privacy. Even under the injunction, the sheriff was permitted to exclude media when security was an issue, to make reasonable searches, to make reasonable time, place, manner restrictions, and to require consent from inmates.[9] The Court, however, was clearly differentiating between the media and the public. "The access needs of the news media and the public differ. Media access, on reasonable notice, may be desirable in the wake of a newsworthy event, while the interest of the public in observing jail conditions may be satisfied by formal, scheduled tours."[10] Notice of varying administrative problems is also given: a large group of the public would require more supervision "than a single reporter, known to jail officials."[11] The Circuit Court further noted: "Although both groups have an equal constitutional right of access to jails, because of differing needs and administrative problems, common sense mandates that the implementation of those correlative rights not be identical."[12]

Perhaps the basic problem for the Supreme Court in review was the lower court's use of the "common sense" phrase. The difference in both need and function, becomes, to the Court, an argument for "an implied special right of access to government controlled sources of information."[13] KQED argued that it had a constitutionally guaranteed right to gather news and the right to receive information. Access to penal institutions, according to the media, "is necessary to prevent officials from concealing prison conditions from the voters and impairing the public's right to discuss and criticize the prison system and its administration."[15] In view of the history of the institution, the reports of inmate illness, and the suicide of one inmate, some basis for public concern about the system and its administration obviously exists.

The Federal District Court had preliminarily enjoined the sheriff from denying news persons limited access. This action was upheld by the Court of Appeals of Ninth Circuit before a hearing with reversal at the U.S. Supreme Court level. The Supreme Court noted agreement with the generalized concerns and quoted Pell: "conditions in jails and prisons are clearly matters 'of great public importance'."[16]

Mr. Chief Justice Burger, in delivering the Court's opinion, said the main question was "whether the news media have a constitutional right of access to a county jail, over and above that of other persons, to interview inmates and make sound recordings, films, and photographs" for the media.[17] Although allowing the media to serve as the 'eyes and ears' of the public is a valuable function, Burger noted that they "like all other components of our society...are subject to limits."[18] After discussing the role of media as distinctly different from government, Burger continued: "We must not confuse the role of the media with that of government; each has special, crucial functions each complimenting--and sometimes conflicting with--the other."[19] The public has a legitimate interest in prisons and the media have an interest in providing such information; nonetheless, this did not, according to the Chief Justice, equal a constitutional guarantee: "This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control."[20]

Continuing a line of reasoning which has now become all too familiar, the Chief Justice differentiated between the freedom to communicate information once it has been obtained and the freedom to acquire information.[21] Neither Grosjean nor Mills "intimated that the Constitution compels the government to provide the media with information or access to it on demand."[22] Burger, after rehearsing the context of Grosjean and the background of the Court's comments regarding the role and function of the press, reported that "nothing in the Court's holding implied a special privilege of access (original stress) to information as distinguished from a right to publish information which has been obtained."[23]

Mr. Chief Justice used the same technique in dealing with both KQED and the Appellate Court's reasoning with regard to Mills. After noting that the Court discussed the role of media regarding the correction of official and governmental abuse, he continued: "the Court did not remotely imply a constitutional right guaranteeing anyone access to government information beyond that open to the public generally."[24] The discounting of a Branzburg based argument was handled with even greater dispatch; after quoting the observation from dictum that "news gathering is

not without its First Amendment protections,"[25] he continued: this "in no sense impled a constitutional right of access to news sources."[26]

Chief Justice Burger reported, briefly, a precedent cited in both Bransburg and Pell, Zemel v. Rusk.[27] That case, in which a ban on travel to Cuba was at issue because of a similar claim to privilege of information acquisition, resulted in a similar rejection on constitutional basis. Claiming similarity in reasoning regarding the basis of the action, he quoted from Warren: "The right to speak and publish does not carry with it the unrestrained right to gather information."[28]

Perhaps the key to the KQED decision is treated almost as an aside: "The right to receive (original stress) ideas and information is not the issue in this case."[29] One of the unsolvable dilemmas of the case will always be the possibility of a different basis for the Court's reasoning had NAACP been major party to the action. In its action which was treated only secondarily even at District level, they claimed: "Public access to such information was essential,...in order for NAACP members to participate in the public debate on jail conditions in the cells and facilities was the most effective way of informing the public of prison conditions."[30] The possibility becomes more intriguing because the court did list the catalogue of "right of reception" cases before restating the issue at bar: "The issue is a claim of special privilege of access which the Court rejected...a right which is not essential to guarantee the freedom to communicate or publish."[31] One is left in the uncomfortable position that this issue, recast to the receiver's need for information rather than the communicator's need for same, may have resulted in a line of more persuasive argumentation.

Mr. Justice Stevens, who delivered the dissenting opinion in KQED, avoids the fine line distinctions among acquisition of information, dissemination of information and reception of information, which seem at issue in the majority's considerations. He contends that even if Pell, supra, denies newsmen greater access than the general public, that the Court never "intimated that a nondiscriminatory policy of excluding entirely both the public and the press from access to information about prison conditions would avoid constitutional scrutiny. Indeed, Pell

itself strongly suggests the contrary."[32] Stevens continued to take issue with the narrow reading given Pell: "The decision...does not imply that a state policy of concealing prison conditions from the press, or a policy denying the press any opportunity to observe those conditions, could have been justified simply by point to like concealment from, and denial to, the general public."[33]

Total access by the public and the media must be considered, Stevens argued; in this case, prior to initiation of the suit, virtually no public or media access existed, and censorship of the inmates' mail had been conducted. The sheriff's "no access policy, modified only in the wake of...resort to the courts, could only survive constitutional scrutiny only if the Constitution affords no protection to the public's right to be informed about conditions within those public institutions where some of its members are confined because they have been charged with or found guilty of criminal offenses."[34]

Generally recognized as a main component of the self-governing philosophy of the First Amendment is the concept of the public's right to know and its requisite correlate, the "preservation of a full and free flow of information." As Justice Stevens said, "It is for this reason that the First Amendment protects not only the dissemination but also the receipt of information and ideas."[35] Stevens' holistic approach avoids the nice distinctions drawn by Burger for the majority. Following Stevens' implied logic, we are left with an almost consumer orientation; if the public needs the information to make informed decisions, then the process of acquiring the information also is protected.

If the self-governing process is to work, a well informed public is required; that necessitates a constant, free flow of information. Justice Stevens recognized this and related it to the case at hand: "Without some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be strippped of its substance. For that reason information-gathering is entitled to some measure of constitutional protection."[36] Media are not the exclusive

conveyers of such information; the public's right to know argument might have been less germane if other means existed at Santa Rita to provide information to the general public about conditions in the facility. However such was not the case; the only available processes were limited in scope and imposed following instigation of the suit.

Although the majority of the Court accepted the tours as an adequate inspection route, Justice Stevens noted several problems: There was no guarantee of the tours' continuance; they were limited in the number of participants. Cameras and sound equipment were forbidden on the grounds of protecting security and lock-up systems. Of greater concern to the media, communication with inmates on these tours was forbidden because of "excessive time consumption, 'problems with control of inmates' and a belief 'that interviews would be excessively unwieldly'."[37] Stevens' dissent also reported that the guided tours "revealed the inadequacy..as a means of obtaining information about the inmates and their conditions of confinement for transmission to the public." Prisoners were not in the area on tour if possible; areas were limited, and fixed scheduling negated the possibility of spot news coverage. Although at least four such tours had taken place prior to the evidentiary hearing, none of the problems actually encountered is noted in the majority opinion.

Because of the limits placed on the tours and the participants, even if a media representative were allowed to visit on the scheduled tour, he/she was still denied professional privilege of access at the time of a news event in the prison, still denied use of sound or camera equipment and therefore effectively denied access for the requisite purpose.

Stevens said that "means available..for informing the public about conditions in Santa Rita jail were, as a practical matter nonexistent."[38]

Although the sheriff had offered to supply the media with information on released inmates, interviews with such persons still did not allow media access to view conditions thus allowing for objective reporting based on first-hand information. According to Justice Stevens, even allowing for the tour and the former-inmate interviews was insufficient; means were simply not available for informing

the general public about the actual conditions of the facility. The public's right to know, actually the public's corporate right of supervision of the expenditure of its money and the treatment of its prisoners was effectively overlooked or ignored in the majority decision.

Justice Stevens did not advocate absolute forced access to all government information. There are "apparent and legitimate" reasons for secrecy in government such as grand juries and matters of national security. He supported the contention however, that in the case of the Santa Rita jail the media were not seeking to force disclosure of confidential information or to invade the decision-making process of government officials. They were simply asking to end the jail officials' policy of concealment. According to the dissent, the conditions to which the media sought access were "wholly without claim to confidentiality."

In a methodical manner, Stevens recounted the communication techniques proposed by the sheriff and accepted by the majority of the Court. In each case, he noted the problems with the proposals. Arguments against permitting access and use of camera and sound equipment were particularly weak and certainly without claim of "confidentiality." On a practical level such equipment was then being used in other California jails with no problems. Even KQED had used interviews and tools of the industry in other jails in the Bay area without creating disturbances or problems with the staff. As a matter of record, affidavits were entered into the trial record stating that "news coverage in other penal institutions...had no harmful consequences and in fact served a significant public purpose."[39] Stevens disposed of the arugments of the majority rather indirectly: the district court was "presented with substantial evidence indicating...cameras and interviews with randomly selected inmates neither jeopardized security nor threatened legitimate penological interests in other prisons where such access was permitted."[40]

Correlative to the issue at hand are the constitutional rights of the inmates. If society can legitimize the public trial as a means of protecting society itself and the accused, then by extension society retains a direct interest in the process of incarceration: "public interest survives the judgment of conviction and

appropriately carries over to an interest in how the convicted person is treated during his period of punishment and hoped for rehabilitation."[41] The inmate has a right not to be subject to 'cruel and unusual punishment' and this may be ensured more "from access to information about prisons by the public than by occasional litigation in a busy court."[42] It is certainly worth mentioning also, that in 1972, Santa Rita's Little Greystone area was held by the courts to be "cruel and unusual punishment."[43] Certainly this would have justified the need for media access to Little Greystone to ensure that the ordered remedy of 1972 was in fact carried out and to guard against any deterioration in the situation.

It is apparent in the Court opinion that heavy reliance was placed on those cases in which the media had been denied any greater access than that of general public. Neither Grosjean nor Mills intimate that the Constitution compels the government to provide the media with information or access to it on demand. In Branzburg the Court said: "The first Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally," and "newsmen have no constitutional right to access to scenes of crime or disaster when the general public is excluded."[44] In Pell and Saxbe[45] the assumption was that "no constitutional right of access to prisons or their inmates beyond that afforded the general public" existed for the media. Based on those cases, the Court in the case under discussion reported: "The issue is a claim of special privilege of access which the Court rejected...a right which is not essential to guarantee the freedom to communicate or publish."[46]

It is this idea which provided the philosophical point of Justice Stewart's separate opinion. Although concurring in judgment, he argued "that the concept of equal access must be accorded more flexibility in order to accommodate the practical distinctions between the press and the general public."[47] He continued: "...terms of access that are reasonably imposed on individual members of the public may, if they empede effective reporting without sufficient justification, be unreasonable as applied to juournlaists who are there to convey to general public what the

visitor see(s)."[48] Stewart, in the past a supporter of media rights, displays understanding of the function of the press: "Our society depends heavily on the press for ...enlightement...that the First Amendment speaks separately of freedom of speech and freedom of the press is no constitutional accident, but an acknowledgement of the critical role played by the press in American society."[49] It further seems likely that the special phrasing of that amendment, as interpreted by Stewart and Stevens in this dissent, may be assumed to have been the Framers' acknowledgement of the functional and utilitiarian differences between press and speech. Stewart and the dissenters apparently acknowledge that effective access like effective equality requires, at times, different procedures.

Justice Douglas, in his dissenting opinion Pell, anticipated correctly the problems with the "no greater access" interpretation.

> The average citizen is most unlikely to inform himself about the operation of the prison system by requesting an interview with a particular inmate with whom he has no prior relationship. He is likely instead, in a society which values a free press, to rely upon the media for information. It is indeed ironic for the Court to justify the exclusion of the press by noting that the government has gone beyond the press and expanded the exclusion to include the public. Could the government deny the press access to all public institutions and prohibit interviews with all government employees? Could it find constitutional footing by expanding the ban to deny such access to everyone."[50]

Justice Powell, who also partially dissented in Saxbe and Pell prior to joining the dissent in Houchins, has wrestled with the problem of reporters' rights. While agreeing that newsmen have "no constitutional rights superior to those enjoyed by ordinary citizens, (he) cannot follow the Court in concluding that any governmental restriction on press access to information, so long as it is nondiscriminatory, falls outside the purview of First Amendment concern."[51] The interview ban in Saxbe was "categorical in nature...(and thereby) "obstructed accurate and effective reporting on prison conditions."[52] In such cases, Powell reports that "the constitutionally established role of the news media is directly implicated" and the "underlying right is the right of the public generally. Echoing Douglas, he suggested that the press represents the people, beyond their ability and/or interest to do so for themselves, and thus should convey information to the public. Forbidding access

to the press is therefore forbidding that information to the public. Implied in this position is the notion that since the press represents the people, and because the press can have no greater right than the public, it therefore cannot have less.[53] The public has a right to know about conditions in prisons through a free flow of information.

The proper question in Houchins was "whether petitioner's policies,which cut off the flow of information at its source, abridge the public's right to be informed about those conditions."[54] Accepting Powell's earlier arguments, if information in this case has in fact been cut off at the source, because the consumer cases have established the public's right to information, the sheriff's action supported by the Supreme Court constitutes a form of prior restraint. Access was denied in newsworthy events such as covering stories of alleged gang rapes and poor physical conditions within the jail. This form of cutting off the news at its source is as real and effective a form of prior restraint as the stamp taxes the founding Fathers fought or as real as the forms the Supreme Court repeatedly struck down.

In the so-called Pentagon Papers case[55] Justice Brennan said:

> "The First Amendment tolerates absolutely no prior restraint of the press predicated upon surmise or conjecture that untoward consequences may result. Our cases...have indicated that there is a sigle, narrow class of cases in which the First Amendment's ban or prior restraint may be over-ridden. Our cases have thus far indicated that such cases may arise only when the Nation is at war."[56]

Justice Douglas wrote in the case:

> "The dominant purpose of the First Amendment was to prohibit the wide-spread practice of governmental suppression of embarrassing information...Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic erors. Open public debate and discussion of public issues are vital to our national health. On public questions there should be 'uninhibited, robust, and wide-open' debate."[57]

In the Nebraska Press Association v. Stuart ruling the Supreme Court wrote:

> The thread that runs through Near and New York Times is that prior restraints on speech and publication are the most serious and the least tolerable infringement on the First Amendment rights...A prior restraint,...by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the

> time. The damage can be particularly great when the prior restraint falls upon the communication and news commentary on current events."[58]

Certainly, in all of the cases dealing with prior restraint, no justification is found for the suppression of news from the penal institutions of the nation. It could not be justified under Near on grounds of national security, nor can it be justified upon the "surmise or conjecture" of the sheriff that security might be weakened if the media were allowed access. It was clearly established that denial of access had the effect of "freez(ing)"information. The most stinging comment is undoubtedly Justice Douglas's note that secrecy in government "perpetuat(es) bureaucratic errors." The secrecy and "suppression of embarrassing information" involved in the denial of access to Santa Rita almost certainly have the effect of "perpetuating" existing problems. Certainly the "uninhibited" public debate encouraged by Douglas in Pentagon Papers and by the Court itself in the Sullivan decision is hindered and limited when information is cut off at its source.

Additionally, the supression of information at Santa Rita fails the "clear and present danger test"[59] as promulgated in Brandeis' dissent in Whitney: "In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated." Sheriff Houchins' claim that security would be impaired was supported with such weakness as to be unbelievable and clearly failed the standards proposed above. A further constraint to limitation was a comment by Justice Black in Pentagon Papers:[60] "The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment."

In terms of current First Amendment theory, the ruling in KQED was particularly inconsistent. For example, Professor Meiklejohn wrote: "What is essential is not that everyone shall speak, but that everything worth saying shall be said."[61] Self-government, according to Meiklejohn, requires that the First Amendment be interpreted in that light. The KQED ruling is certainly not in line with this reasoning. The reporters who sought to see for themselves what Santa Rita was like on

the inside were made voiceless. Even more directly, the inmates who clearly had something "worth saying" about conditions on the inside were not allowed a direct access to the public through the media.

Zechariah Chafee in his book, Free Speech in the United States, wrote"

> the true boundary line of the First Amendment can be fixed only when Congress and the courts realize that the principle on which speech is classified as lawful or unlawful involves the balancing against each other of two very important social interests, in public safety and in the search for truth...the great interest in free speech should be sacrificed only when the interest in public safety is really imperiled.[62]

Using this system of balacing, the prohibition against media access to Santa Rita is inadequately weighted. It is not only unjustified in terms of public safety, but an argument that public safety would be better served if access were not allowed was easily refuted by the various dissents. Certainly society should have learned from the prison riots of the past where hostages have been taken; in nearly every instance, the inmates have demanded opportunity to talk with the press.

However, the resounding case against the KQED reasoning has been made indirectly by Vincent Blasi in "Checking Value in First Amendment Theory."[63] It is Blasi's belief that Thomas Jefferson and James Madison and other founding fathers intended the role of the press to be as a check on the government's potential abuse of power. Historical analysis of events leading to the Constitution and the Bill of Rights supports this idea of the First Amendment. "The central premise of the checking value is that the abuse of official power is an especially serious evil...the check on government must come from the power of public opinion, which in turn rests on the power of the populace to retire officials at the polls..."[64] The investigative resources generally available to the public which would be necessary to supply the quality of information necessary for the public to act properly in checking its own government are not radily available--except through the media." Additionally the size and complexity of modern government require that the force which acts to check its power and expose its abuses needs to be "well-organized, well-financed, professional critics to serve as a counterforce to government--critics capable of acquiring enough information to pass judgment on the actions of

government, and also capable of disseminating"[65] this information to the public--i.e., the American mass media.

In order for this "checking value" of the media to work properly in its designed role in American democracy, full access to information is obviously an extremely important right. Blasi bases a portion of his theory on Justice Powell's opinion in Mills:

> "The Constitution specifically selected the press..to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve."[66]

In critiquing Justice White's opinion in Branzburg which rejected the claim of news media to First Amendment protection of news gathering and formed a basis for the decisions in Pell, Saxbe and KQED, Blasi said:

> "It seems evident from a close reading of the White opinion that the news gathering interest was not accorded special consideration in part because the majority rejected any theory of the First Amendment which assigns to the professional press a special watch-dog function over public officials." Continuing, Blasi notes that the White opinion failed to mention "the speech value of news about possible official misbehavior obtained from persons against whom abuses of power may have been directed."[67]

Certainly prisoners would qualify, in many cases, as "persons against whom abuses of power may have been directed." And Blasi sees value in the watchdog contribution their voices would make, and would, in effect, therefore be accorded First Amendment right.

In Branzburg, the dissenting voice of Justice Douglas, noted: "effective self-government cannot succeed unless the people are immersed in a steady, robust, unimpeded, and uncensored flow of opinion and reporting which are continuously subjected to critique, rebuttal, and re-examination."[68] Douglas concluded these principles justify "absolute privilege" and said "There is no higher function performed under our constitutional regime" than the function of the press" to explore and investigate events, inform the people what is going on, and to expose the harmful as well as the good influences at work.[69] Douglas, in Pell and Saxbe, "took

sharp issue with the majority's conclusion that reporter's have no greater right to information" than the average citizen.

Blasi said Justice Douglas "viewed the average citizen's reliance on the media for information about public affairs to be part of the constitutional design;" in this respect, Justice Douglas read the First Amendment as envisioning a special investigative role for the professional press.[70] Blasi also found Powell's dissent in Saxbe to hinge on the watchdog theory of the First Amendment. Justice Powell wrote that the ban on inmates' interviews violated the "constitutional rights of the reading public" and that the "paramount value" of the First Amendment was its "societal function."[71] Powell continued: "no aspect of that constitutional guarantee is more rightly treasured than its protection of the ability of our people through free and open debate to consider and resolve their own destiny."[72] Powell's "societal function," a Meiklejohn phrase, is dependent on newsgathering by the media. Public debate and information are necessary to democracty, but "unrestrained public access" to all information on government activities and institutions is impossible to individual members of the public. Therefore the public must depend on the press. Justice Powell argued that because of this reasoning there is a "constitutionally established role of the news media."[73] The checking value is implicit here. To close the prisons to the press, closes them to the public also. This denial of access and information breads the important chain necessary, according to Blasi, in protecting the public against abuses of power by the government.

The inconsistency in the various justices and their rulings in newsgathering cases in explained by Blasi on one level by saying there is no dominant underlying First Amendment theory to which the Justices ascribe, although some have intuitively ruled along the "checking value" theory. Blasi also says the rulings in newsgathering cases which deny First Amendment protection can also be "attributed to a fundamental hypocrisy on the part of the majority of Justices." A "more plausible explanation" is offered by Blasi when he writes:

> "The justices are in fact ambivalent about the newsgathering interest. They believe that it implicates some important values, but they are

> reluctant to grant it the full measure of First Amendment protection because (1) they cannot foresee the implications of such a step, and (2) they sense that, in some imperfectly understood way, newsgathering is different from such core First Amendment activities as public speaking, pamphleteering, and demonstrating."[74]

Few statements have ever been made about the Court which ring more true to the ears of the newsgatherer. To protect the right of dissemination and not the right of acquisition is to make of the press empty vessels. Newsgathering is different. And if the Justices cannot foresee the implications of granting full measure of First Amendment protection, it is also true that they have not foreseen the implications of not granting same.

The line of reasoning traced in this paper, reaching its apex (it should be hoped) in Houchins, illustrates nothing else quire as clearly as it does the confusion of the Court about both the First Amendment and the process of communication.

The Supreme Court, in reversing,the judgment of the Court of Appeals, presented a decision which is, at best, a problem for both communicators and the public. heard and decided by a seven-man Court, the case ends in a decision delivered by Burger; he was joined by White and Rehnquist. Stewart concurred in judgment, but not in the rationale for reaching it. Stevens, who wrote the dissent, was joined by Brennan and Powell. In actuality then, Houchins is a 3-1-3 decision; and its application to further cases and practices will be just as illustrated here by Pell and Saxbe...it will provide adequate ground for supporting almost any interpretation of the First Amendment. Houchins,more than any other recent media access case, is a symbol of the Court's confusion regarding this most basic of all amendments. How far the Court has gone from the days when Brandeis although even then in dissent, wrote: "Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law--the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."[75]

Houchins v. KQED...yet another study in confusion.

ENDNOTES

1
Writing of James Madison 103 taken from the G. Hurst edition 1910, as quoted by Justice Stevens in Houchins v. KQED at 2533.

2
Houchins v. KQED, 97 S.Ct. 773, 438 U.S.1, e Med. L. Rptr. 2521.

3.
Id. at 15-16.

4
Id. at 4.

5
KQED, Inc. and NAACP v. Houchins, 546 F. 2d 284, 2 Med. L. Rptr. 1116.

6
Pell v. Prochnier, 417 U.S. 817 at 834, 94 S.Ct. 2800, 41 L.Ed.2d 495. 1 Med. L. Rptr. 2379.

7
KQED at 286.

8
Id.

9
Id.

10
Id. at 288.

11
Id.

12
Id.

13
Houchins at 8.

14
See also Grosjean v. American Press Co., 297 U.S. 233 and Mills v. Alabama,384 U.S. 214.

15
Houchins at 8.

16
Id., quoting Pell at 830 n7.

17
Id. at 1-2.

18
Id. at 8.

19
Id.

20
Id.

21
Grosjean, Mills, supra.

22
Houchins at 9.

23
Id.

24
Id.

25
Id. but taken from Branzburg, 408 U.S. at 707.

26
Id.

27
381 U.S. 1, also 1 Med. L. Rptr. 2299.

28
Id. at 16-17.

29
Houchins at 12.

30
Id. at 4.

31
Id. at 12.

32
Id. at 27-8.

33
Id. at 29.

34
Id.

35
See also Virginia Pharmacy Board v. Virginia Consumer Council, 415 U.S. 748. Procunier v. Martiney, 416 U.S. 396.

36
Houchins at 32.

37
Id. at 22, n8.

38
Id.

39 Id. at 21.

40 Id. at 29.

41 Id. at 38.

42 Id. at 22, see also n7.

43 See Brennenman v. Madigan, 343 F. Supp. 128, 132-133 (ND Cal. 1972)

44 Supra n25.

45 Saxbe v. Washington Post Co., 417 U.S. 843, 94 S.Ct. 2881, 41 L.Ed.2d 514, 1 Med. L. Rptr. 2314.

46 Houchins at 12.

47 Id. at 16.

48 Id.

49 Id.

50 Pell at 841.

51 Saxbe at 857.

52 Id. at 859.

53 Pell at 841.

54 Houchins at 34.

55 New York Times v. United States, 403 U.S. 713, 29 L.Ed.2d. 822, 1 Med. L. Rptr 1031.

56 Id. at 2147.

57 Id.

58
427 U.S. 539, at 548.

59
Whitney v. California, 274 U.S. 357 at 375-376.

60
New York Times at 1033.

61
M. Franklin, The First Amendment and the Fourth Estate, 81, quoting from "Free Speech and its Relation to Self-Government."

62
1941 reprint of 1921 volume Free Speech in the United States, at 564-5.

63
Am. Bar Assoc. Research Journal, 1977: 521.

64
Supra at 539.

65
Supra at 541.

66
Mills, at 1336.

67
Blasi. Supra at 593.

68
At 2636.

69
Id.

70
Blasi, supra at 598.

71
Saxbe at 855.

72
Id.

73
Id.

74
Blasi. supra at 602.

75
Whitney at 362.